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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALLAN FALK,

Appellant,

-v-

STATE BAR OF MICHIGAN,

Appellee.

On Appeal From
the Supreme Court of Michigan

JURISDICTIONAL STATEMENT

ALLAN FALK
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In propria persona
Counsel for Appellant

May, 1984

QUESTIONS PRESENTED

1. Does the First Amendment preclude a State unified bar association from expending compulsory dues of objecting members for:

a. Lobbying activities — efforts to influence Congress, the State Legislature, national and State Chief Executives, and State courts and administrative agencies in their respective rulemaking capacities;

b. In support of candidates for private office — to help a former State Bar President gain election to the Presidency of the American Bar Association;

c. Political and ideological activities other than lobbying — influencing public opinion on constitutional amendments, on attitudes toward the legal profession, and on the value and use of professional legal services;

d. Social activities open only to selected members and used for the purpose of acquiring and exercising political influence;

e. Economic activities benefitting only some members of the bar, those in private practice — lawyer referral services, lawyer placement services, prepaid legal service plans, Client Security Fund?

2. Has the State Bar of Michigan established that the activities adumbrated in Question 1 serve a "compelling governmental interest", or met any other recognized constitutional standard for overcoming Appellant's First Amendment rights in the premises?

3. Assuming *arguendo* the challenged activities of the

State Bar of Michigan, a State unified bar, do serve a "compelling governmental interest", is Appellant nonetheless entitled to relief because those activities could be carried on through a "less drastic means" which does not infringe Appellant's First Amendment rights, *i.e.* voluntary contributions, as was the case in the District of Columbia and is the case in States with voluntary bar associations?

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JURISDICTIONAL STATEMENT

REPORTS OF OPINIONS BELOW

The final opinion of the Michigan Supreme Court is reported at 418 Mich. 270, 342 NW2d 504 (1983); the first set of opinions of the Michigan Supreme Court is reported at 411 Mich. 63, 305 NW2d 201 (1981).

GROUNDS FOR JURISDICTION

(i) This action commenced as a complaint for superintending control, invoking the original jurisdiction of the Michigan Supreme Court over the State Bar of Michigan pursuant to MCL 600.215, MSA 27A.215; MCL 600.219, MSA 27A.219, and MGCR 1963, 851(6). The complaint

sought declaratory relief — a declaration that certain uses of mandatory dues collected by the State Bar of Michigan, a unified bar association by virtue of MCL 600.901 *et seq.*, MSA 27A.901 *et seq.*, and certain practices and policies of the State Bar of Michigan, are unconstitutional under the First and Fourteenth Amendments — and ancillary monetary relief, a rebate *pro rata* of mandatory dues thus unlawfully expended.

(ii) The final order and opinion of the Michigan Supreme Court were released on December 29, 1983; Appellant's timely motion for rehearing was denied March 6, 1984. Notice of Appeal was filed May 24, 1984 with the Michigan Supreme Court.

(iii) The jurisdiction of this Court is invoked pursuant to 28 USC § 1257(2) and *Lathrop v. Donohue*, 367 U.S. 820 (1961), where appeal was entertained to consider most of the specific issues herein raised, but decision on the merits was avoided due to procedural obstacles. See the discussion in *Abood v. Detroit Board of Education*, 431 U.S. 209, 233 n. 29 (1977).

Of the four justices of the Michigan Supreme Court constituting the majority supporting the decision to dismiss Appellant's Complaint, two interpreted MCL 600.901 *et seq.*, MSA 27A.901 *et seq.*, the statute creating the State Bar of Michigan, and State Bar Rules 1, 9, 11, promulgated by the Michigan Supreme Court, which define the objectives, powers, and duties of the State Bar of Michigan, as raising justiciable issues under the First Amendment. See 418 Mich. at 282 ff. The three dissenting justices on the seven member court also grounded their opinion in the First Amendment. The two remaining majority justices relied on

a procedural point twice rejected by all five of their colleagues; see 418 Mich. at 278. The pertinent federal questions were thus entertained by the court below, and the decision from which appeal is taken does not rest on an adequate state ground. *United Air Lines v. Mahin*, 410 U.S. 623, 630-631 (1977).

(iv) The Michigan statute and rules of Court, the constitutional validity of which are questioned by this proceeding, are as follows:

MCL 600.901; MSA 27A.901

The state bar of Michigan is a public body corporate, the membership of which consists of all persons who are now and hereafter licensed to practice law in this state. The members of the state bar of Michigan are officers of the courts of this state, and have the exclusive right to designate themselves as "attorneys and counselors," or "attorneys at law," or "lawyers." No person is authorized to practice law in this state unless he complies with the requirements of the supreme court with regard thereto.

MCL 600.904; MSA 27A.904

The supreme court has the power to provide for the organization, government, and membership of the state bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members, the schedule of membership dues therein, the discipline, suspension, and disbarment of its members for misconduct, and the investigation and examination of applicants for admission to the bar.

State Bar Rule 1

The State Bar of Michigan is the association of the members of the bar of this State, organized and existing as a public body corporate pursuant to the powers of the Supreme Court over the bar of the State. The State Bar of Michigan shall, under these rules, aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this State.

State Bar Rule 9

The Board of Commissioners shall make the necessary appropriations for disbursements from the funds of the treasury to pay the necessary expenses of the State Bar of Michigan, its officers and committees. It shall be the duty of the Board to cause proper books of account to be kept. . .

State Bar Rule 11

Committees of the State Bar of Michigan may be established for the promotion of the objects of the State Bar of Michigan, and shall consist of limited numbers of members appointed by the President. . .

The classes of committees of the State Bar of Michigan shall be:

(a) Standing committees, for the investigation and study of matters relating to the accomplishment of the general purposes, business and objects of the State Bar of Michigan, of a continuous and recurring character, within the limitation of the powers conferred.

(b) Special committees, created by resolution of the Board of Commissioners defining the powers and duties of such committees, to investigate and study matters relating to the specific purposes, business and objects of the State Bar of Michigan of an immediate or non-recurring character. The life of any special committee shall expire at the end of the next annual meeting following its creation unless continued by action of the Board.

For purposes of jurisdiction under 28 USC § 1257(2), Appellant notes that the Rules Concerning the State Bar of Michigan, promulgated by the Michigan Supreme Court pursuant to the power delegated by the Michigan Legislature in MCL 600.901 and .904, MSA 27A.901 and .904, are deemed state "statutes". See *Lathrop v. Donohue, supra; In re Griffiths*, 413 U.S. 717 (1973); *Mayer v. City of Chicago*, 404 U.S. 189 (1971); *Ronwin v. Arizona Supreme Court*, 52 USLW ____.

STATEMENT OF THE CASE

Appellant is an attorney at law, duly licensed to practice law in the State of Michigan, and thus required by MCL 600.901; MSA 27A.901 to be a dues paying member of the State Bar of Michigan. Michigan is one of 34 States which have so-called "unified" or "partially unified" bars, in addition to the District of Columbia and Puerto Rico.

Appellant commenced this original proceeding in the Michigan Supreme Court, invoking that Court's power of superintending control over the affairs and activities of the State Bar of Michigan. Appellant's Complaint, originally denominated a "Petition for Special Relief", asserted that

the use of his mandatory dues for political and ideological purposes, particularly lobbying, maintenance of a statewide lawyer referral service, the funding of prepaid legal service projects, the creation and maintenance of the Client Security Fund, the funding of the lawyer placement service, expenditures for public relations to encourage Michiganians to utilize lawyers' services, and the expenditure of funds for social activities, were all in derogation of Appellant's rights under the First Amendment.

After the State Bar of Michigan answered the complaint, admitting the expenditure of mandatory dues as alleged but denying that such activities violate Appellant's First Amendment rights, the Michigan Supreme Court appointed Hon. Maurice E. Schoenberger, a former State District Court judge, as a fact finder, and directed him to conduct testimonial hearings on the complaint. 402 Mich. 960 (March 2, 1978).

Those hearings consumed two days and involved but three witnesses: Michael Franck, Esq., Executive Director of the State Bar of Michigan; John Clark, Esq., former State Bar President and former President of the American Judicature Society and a member of the American Bar Association House of Delegates, and Appellant Falk.

Mr. Franck's testimony detailed the manifold activities of the State Bar of Michigan and explained their purposes; Mr. Clark's testimony expanded on his opinion as to the public interest served by the maintenance and expansion of these activities by a unified bar. Appellant's testimony reiterated the allegations in his complaint, and noted that, by virtue of his position as a Commissioner of the Michigan Court of

Appeals, he is precluded from engaging in the private practice of law, and thus obtains no direct benefit from State Bar activities such as the Client Security Fund, prepaid legal services, lawyer referral service, or lawyer placement service.

The fact finder's report observed that the testimony adduced had been essentially uncontradicted, and that the issues presented involved the constitutional implications of the facts, rather than any debate over details. Deeming this beyond the scope of his appointment, he made no recommendations.

Appellant then submitted a brief and a supplemental brief; Appellee filed its answer brief; Appellant then filed a reply brief and Appellee a traverse thereto. By order of April 6, 1979, the Michigan Supreme Court directed its Clerk to calendar the case for June, 1979, and ordered the parties to print the briefs previously submitted.

The case was orally argued on June 5, 1979; on April 29, 1981 the Supreme Court of Michigan, in a per curiam opinion, announced that it was unable to reach a majority decision, and that further evidentiary hearings would be necessitated. Accompanying the per curiam opinion were three separate opinions, one by Justice Ryan, in which Justices Fitzgerald and Moody concurred, broadly but not completely supporting Appellant's positions. A second opinion, by Justice Williams, in which Chief Justice Coleman, who had not heard oral argument, concurred, essentially repudiated Appellant's arguments, except for a right of privacy claim involving the use of the State Bar's mailing list, an issue the other justices declined to consider on procedural grounds. The third opinion, by Justices Levin and

Kavanagh, rejected Appellant's arguments as to the Client Security Fund, Children's Charter, Lawyer's Wives, lawyer referral service, and educational activities aimed at the public and the profession — educational pamphlets, the Michigan State Bar Journal, public forums, continuing legal education programs (which Appellant specifically disavowed challenging), but indicated a need for additional evidence on other points, evidence the other justices, in their separate opinions, found unnecessary to decision.

The Michigan Supreme Court thereupon appointed Hon. James H. Lincoln, retired Probate judge, as master to preside over further hearings. Judge Lincoln called the parties into conference and presented his preliminary views on the issues remaining, focussing primarily on the lobbying question, his notion being that due process (notifying members before the Board of Commissioners of the State Bar takes a position on legislation or court rule amendments, and offering them an opportunity to be heard thereon) would cure any constitutional defects. Four months later, after 14 trial days involving 75 witnesses and the introduction of 98 exhibits, comprising 2500 pages of testimony, Judge Lincoln submitted his recommendation to the Supreme Court, paralleling exactly his original views.[1]

Before the second set of hearings, the State Bar agreed to allow members to delete their names from its mailing list when that list is used for commercial purposes, thereby satisfying Appellant's right of privacy claim, and to allow lawyers under 36 years of age or with fewer than 10 years of licensure in Michigan to withdraw their names from the

[1] Similar to the views of the Florida Supreme Court, 439 So2d 213, *infra*, p. 10.

roster of the Young Lawyers Section, thereby resolving in part one of Appellant's claims of forced association. Note that Appellant has never claimed that the basic forced association — membership in the State Bar itself — is inherently unconstitutional; Appellant has conceded that the unification of the State Bar passes muster under the First Amendment to the extent it subserves regulatory interests of the State, the need to identify, regulate, and discipline those licensed to practice law in Michigan.

The State Bar of Michigan accepted Judge Lincoln's recommendations, and has since taken steps to implement them. Appellant rejected the concept of providing notice and an opportunity for hearing as a sufficient safeguard for State Bar political and ideological activity, and briefed the constitutional questions thus presented.

Appellant submitted, on reargument, a witness by witness summary of the hearings before Judge Lincoln. The plurality opinion of Justices Ryan, Brickley, and M. Cavanagh specifically found that this summary was reasonably accurate and that the State Bar, by failing to file a counterstatement of facts, was deemed to have accepted it pursuant to the Court's rules of practice, MGCR 1963, 814.2, 854. See 418 Mich. at 307, n. 5. The other opinions did not directly address themselves to factual questions. That summary, crucial to an understanding of the issues herein presented, is reproduced in the Appendix (pages 135-175).

Following reargument on March 9, 1983, the Michigan Supreme Court rendered its decision on December 29, 1983. Again, a majority of the seven justices could not agree on an opinion. Two justices, Chief Justice Williams and Justice

Boyle, who had not been present for oral argument, examined what they termed "negative First Amendment rights" cases and came up with a formulation by which the invasion of Appellant's First Amendment rights is balanced against the magnitude of the government interest sought to be served, to determine whether the latter outweighs the former. See 418 Mich. at 288. Under this rubric, which expressly rejects the "strict scrutiny" test of classic First Amendment cases, they concluded that the State Bar activities challenged, particularly lobbying, do not impermissibly infringe on Appellant's First Amendment rights.

Two other justices, Levin and T.G. Kavanagh, rejected the conclusion of their five current colleagues and three former colleagues (Justices Moody, who died, and Coleman and Fitzgerald, who retired) that the complaint for superintending control properly invoked the Court's original jurisdiction, and held that the complaint should be dismissed on procedural grounds. This thus produced a majority of four justices voting for dismissal.

As indicated, Justices Ryan, Brickley, and M. Cavanagh basically agreed with all of Appellant's arguments and voted to require the State Bar of Michigan to refund the improperly expended portion of Appellant's dues (actually, by stipulation of the parties Appellant withheld dues while the suit has been pending; Justice Ryan's opinion therefore directs Appellant to pay the appropriate portion of dues, representing constitutionally valid bar expenditures), and to enjoin the State Bar from continuing specified activities so long as they are funded by mandatory dues — lobbying being primary among these (again, in actuality the Ryan opinion limits the State Bar to expending dues only for 6

approved purposes: (1) regulatory activities (not challenged); (2) continuing legal education (not challenged); (3) publication of the Michigan Bar Journal, except use of the Journal to promote political and ideological causes; (4) Client Security Fund; (5) educational activities aimed at the general public; and (6) lawyer referral service and legal services for the indigent. The State Bar would be permitted to engage in other activities only by using funds solicited from members making voluntary donations.

Appellant filed a timely motion for rehearing, which was denied, without further comment, on March 6, 1984. This Jurisdictional Statement was filed with the Court within 90 days of March 6.

REASONS FOR PLENARY CONSIDERATION

1. **Other State and Federal Courts which have considered the identical constitutional questions would have ruled in Appellant's favor; the resulting split of authority means that lawyers in Michigan have fewer First Amendment rights than lawyers in New Mexico, Montana, Wisconsin, the District of Columbia, and Puerto Rico.**

Appellant was the first lawyer to file a challenge to unified bar activities following the decision in *Abood v. Detroit Board of Education, supra*, and the Michigan Supreme Court's first set of opinions, 411 Mich. 63, 305 NW2d 201, represents the first reported judicial expression on those constitutional issues as applied to a unified bar association.

While reargument was pending, the plurality opinion of Justice Ryan, 411 Mich. 84-119, was adopted and followed by the Federal District Court of New Mexico in *Arrow v.*

Dow, 544 F Supp 458 (1983), a class action suit for money damages. Courts in Montana, *Reynolds v. State Bar of Montana*, 660 P2d 581 (Mont, 1983) and Puerto Rico, *Schneider v. Colegio de Abogados de Puerto Rico*, 565 F Supp 963 (1983) soon followed suit. Courts in the District of Columbia, *On Petition to Amend Rule 1 of the Rules Concerning the Bar*, 431 A2d 521 (DC App, 1981) and Wisconsin, *Report of Committee to Review the State Bar*, 334 NW2d 544 (Wis, 1983) changed the rules governing their respective bar associations to prohibit lobbying and other activities of those unified bar associations, thereby circumventing constitutional challenges.

Only Michigan and Florida, *The Florida Bar re: Amendment to Integration Rule of the Florida Bar (Political Activities of the Bar)*, 439 So2d 213 (1983) have rejected such challenges. The Michigan rejection has the narrowest support possible — of the ten justices to hear the case, 5 have voted to support Appellant's position, 3 against (two not having heard oral arguments), and 2 have refused to address the merits.

The First Amendment is the "supreme law of the Land", US Const, Art VI. Yet lawyers in Michigan and Florida are compelled to contribute bar dues for political and ideological expenditures, in particular for lobbying activities by their unified bar associations, while lawyers in other jurisdictions are free to disassociate themselves from these efforts when they disagree with the philosophy which motivates them or the goals toward which they are directed.

The Court should give plenary consideration to the issues herein raised so as to make uniform the application of the

First Amendment to lawyers in all jurisdictions subject to the Constitution of the United States.

2. **The Michigan Supreme Court has misapprehended the concept of "germaneness" in creating an unprecedented balancing test by which lawyers' First Amendment rights may be overcome by state interests which are merely positive but not "compelling".**

That part of the majority of the Michigan Supreme Court which addressed the constitutional issues on the merits purports to extract, from selected "negative First Amendment" cases, a "balancing test" for determining when individual First Amendment rights must yield to State interests. Rather than apply the traditional "compelling State interest" test, the Michigan Supreme Court purports to recognize a "sliding scale approach":

> "The more serious the infringement of individual interests, the more vital the asserted advancement of government interests must be to outweigh the infringement and vice versa. The question in each case must be whether the compelled participation in expression infringes unduly upon individual interests."

418 Mich. at 292, citing Gaebler, First Amendment Protection Against Government Compelled Expression and Association, 23 BC L Rev 995, 1016 (1982).

The error in this approach is manifest. First, the cases relied upon do not support it. For example, in *Wooley v. Maynard*, 430 U.S. 705 (1977) this Court disavowed expressly any distinction between "positive" and "negative"

First Amendment rights:

"We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all . . . A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.' "

430 U.S. at 714.

Moreover, this Court in *Wooley* explicitly applied a "least drastic means" test to the balancing process — a traditional, alternative formulation of "strict scrutiny":

> "Even were we to credit the State's reasons and 'even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.' *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)."

430 U.S. at 716.

The evidence established, without contradiction, a readily available "less drastic means" — voluntarization of the non-regulatory functions of the State Bar of Michigan. Mr.

James Bierbower, President of the unified District of Columbia Bar Association, and former President of the voluntary Bar Association of the District of Columbia, testified that after the District of Columbia Court of Appeals restricted the uses to which mandatory dues could be put his association continued its non-regulatory programs unabated in level or scope, using voluntary contributions which the association solicited from its members.[2] Thus, even if a unified bar association's non-regulatory activities could be considered to subserve a "compelling state interest" — a test the Michigan Supreme Court, 5-2, concluded the State Bar of Michigan could not meet — the existence of a less drastic alternative would preclude continuation of the present arrangement whereby these activities are financed with mandatory dues.

Buttressing this conclusion is this Court's closing fillip in *Wooley, Id.*:

> "However, where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."

To like effect is this Court's disclaimer in *Abood v. Detroit Board of Education, supra*, 431 U.S. at 235-236, recently reaffirmed in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, ____ U.S. ____, 52 USLW 4499 (1984):

> "We do not hold that a union cannot constitu-

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[2] Appendix, pp. 174-175.

> tionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of ideological causes not germane to its duties as collective bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing these ideas and who are not coerced into doing so against their will..."

Compulsory membership in any organization is, under our constitutional scheme, aberrant, *NLRB v. Granite State Joint Bd*, 409 U.S 213, 216 (1972), and the impingement on individual First Amendment rights that inheres in such forced association is constitutionally permitted only when the association itself, in the first instance, serves a compelling State interest — "labor peace" in the case of the agency shop, professional responsibility and integrity in the case of the unified bar — and when each activity of that association is integrally and intimately related to accomplishing that compelling State interest. *Ellis v. BRAC, supra.* Every "negative First Amendment" case has thus, contrary to the position of Justices Boyle and Williams below, applied a "compelling government interest" test — which they acknowledge the State Bar of Michigan cannot meet and has not met: *Storer v. Brown*, 415 U.S. 724 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 115-116 (1972); *Miami Herald Pub Co v. Tornillo*, 418 U.S. 241 (1974); *Selfridge v. Carey*, 522 F Supp 693, 696 *affirmed* 660 F2d 516 (CA 2, 1981). Their reliance on *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980) as authority for trampling on Appellant's First Amendment rights is particularly disingenuous, inasmuch as this Court held therein that a State

could EXPAND individual First Amendment rights; nothing was said to suggest that a State could DEROGATE such rights.

All these cases were cited to the Michigan Supreme Court in one or more of Appellant's briefs. The law and the evidence both stand uncontradicted; there is no basis for "weighing" individual First Amendment rights against merely "worthy" government interests.

It should also be noted that the opinion of Justices Boyle and Williams below proceeds on the assumption that, without using mandatory dues to further its non-regulatory activities, the State Bar of Michigan would have to abandon them, to the great detriment of the public interest in having input from the organized bar. Putting aside that these fears are inconsistent with the evidence — Mr. Bierbower's testimony — they are equally at odds with legal precedent.

In Michigan, State agencies other than the State Bar of Michigan are already precluded from using public funds — whether mandatory dues or compelled tax monies — either to lobby or to influence public opinion. *1979 Op Atty Gen No. 5597; 1965-66 Op Atty Gen Nos. 4291, 4421; 1969-70 Op Atty Gen No. 4647.*

Similarly, Congress has enacted a variety of prohibitions on lobbying and other political activity, without noticeably damaging the public weal: 18 USC 1913 bans lobbying by any State, subdivision or organization receiving federal funds; 31 USC 6715 and 1243(d) are to like effect; 26 USC 501(c) prohibits political activity by tax exempt groups (*Quaere* whether the State Bar of Michigan has run afoul of

this enactment); Generally, see "Political Activities" in Index O to R of West's *United States Code Annotated.*

Thus, non-regulatory activity, and particularly political activity, by a unified bar association falls far short of serving a sufficiently weighty State interest to justify any infringement on Appellant's First Amendment rights, even under a test less exacting than the established "compelling State interest, least drastic means" test.

Incidentally, the type of "non-regulatory" activity under scrutiny in this case, other than lobbying, includes the Client Security Fund, which reimburses victims of attorney peculations, in the discretion of the Board of Commissioners of the State Bar, to a maximum of $15,000, but does not cover "one client" situations (corporation counsel, *e.g.*) or attorneys, such as Appellant, who are employed by a government agency. Testimony established that "less drastic" alternatives, which are superior in every respect, exist — mandatory bonding and mandatory malpractice insurance for attorneys in private practice (see testimony of David Jordon, Esq.). Even the dissenters failed to address these alternatives head on, or to analyze the subsidy nature of the Fund — Appellant, although barred from private practice of law, must help private practitioners defray the expense of what is, in essence, a fiduciary bonding scheme.

The State Bar of Michigan has also provided seed money for prepaid legal service plans; the bar's own witness, Lawrence Nolan, Esq., testified that his interest in the concept was purely economic — a desire to expand the scope of his private practice.

Again and again, the testimony revealed that the activities of

the State Bar of Michigan, directly or indirectly, benefit the economic interests of lawyers — not all lawyers, but those in private practice, who dominate the organizational hierarchy. Again and again, the State Bar defends its activities as also serving some public interest — making legal services more available to the middle class, blue collar worker in the case of prepaid legal service plans — which is seen to be serendipitous rather than central or inherent. Appellant is forced to contribute to the financial aggrandizement of other lawyers, who use his money to foster their political and public relations goals.

Neither the Boyle-Williams nor the dissenting opinion below specifically dealt with the State Bar's contribution of $5,000 of mandatory dues monies to the campaign of Wallace D. Riley, Esq., who was then seeking the office of President of the American Bar Association. This issue was raised both by Appellant and Judge Lincoln; no defense has ever been proffered on behalf of the State Bar of Michigan. One beacon of the deficiencies in the Boyle-Williams approach is that this blatantly unconstitutional expenditure was totally ignored in their opinion.

The State Bar has frequently defended its political actions by noting that it is democratically organized on a "one lawyer, one vote" basis. So, of course, are unions, by virtue of the Labor Management and Disclosure Act, 29 USC 481 ff. This made no difference to the result in either *Abood* or *Ellis, supra*; it makes none here. The whole idea of a Bill of Rights is that it cannot be overcome at the whim of a transient majority.

The result below is legally wrong, historically erroneous,

at odds with the uncontradicted evidence, and intellectually dishonest. This Court should grant plenary consideration and reverse, adopting and expanding the result promoted by the dissent.

3. **The use by a unified bar association of mandatory dues for non-regulatory purposes, over the objection of a member, violates that member's First Amendment rights.**

This Court said essentially that in *Abood, supra*, when it reviewed its earlier treatment of these same issues in *Lathrop, supra*, and found that it was writing on clean slate — no majority having coalesced in prior cases on the constitutional issues presented. Conceptually, a unified bar is like a union or agency shop. One may be forced to become a member or otherwise associate, but the infringement of First Amendment rights is self-limiting by the necessity which gave rise to the compulsion. The union or agency shop promotes "labor peace"; this nation's history of labor strife — the Pullman strike, the Cordwainer's strike, the Clayton Act, the "wobblies" so near and dear to the heart of the late Justice Douglas of this Court — establish the social and political necessity sufficient to meet the "compelling government interest" standard.

Whether the history of regulation of the legal profession is quite so compelling is open to question, but that question has not been asked by Appellant, who has conceded from the outset what Mr. Bierbower's testimony suggested, that effective regulation requires that the State have available every lawyer's name, business address, and control over the issuance and use of the license to practice law, something only a unified bar might be able to achieve.

But no such overriding necessity has been suggested or demonstrated to justify extending the uses of mandatory bar dues to non-regulatory areas, especially to lobbying, campaign contributions, and ideological activities such as public relations campaigns designed to foster the image of lawyers and the use of lawyers' services by the public.

Even if there were a "compelling government interest" in assuring continued input into the political equation by the organized bar because of its ostensibly "unique" perspective on the ordering of public affairs, still, the State Bar of Michigan has failed to overcome the only evidence in the record, which establishes beyond peradventure that a less drastic alternative — compelled by the First Amendment, *Shelton v. Tucker, supra* — exists, namely, voluntarization of the funding of such activities.

Not only does the District of Columbia experience establish the efficacy of this alternative. So too does the testimony of the Presidents of the voluntary bar associations of Iowa, Maryland, and Ohio, the latter in particular being demographically and economically similar to Michigan. All those officials testified that their bar associations, using only dues voluntarily contributed, carry on active lobbying before State and national legislatures, maintain Client Security Funds, foster prepaid legal service plans, maintain lawyer referral services, publish pamphlets and brochures explaining the legal rights of the public and promoting the use of lawyers' professional services, in short, that they duplicate, generally and in every particular, the non-regulatory activities of the State Bar of Michigan. To their testimony must be added the dozens of exhibits from the voluntary bar associations in Illinois, New York and else-

where, to like effect.

That *Abood* applies is no longer controverted; that the non-regulatory activities of the State Bar of Michigan fail to meet the "compelling government interest and least drastic means" tests established by this Court was recognized by a MAJORITY of the Michigan Supreme Court. What remains to be declared is that there is no lesser test, and/or that, even if there were, the activities in question are insufficiently consequential to outweigh Appellant's timely and properly asserted First Amendment rights. *Wooley v. Maynard, supra.*

It comes as no shock to this Court that the organized legal profession piously professes to be the loyal slave of the public interest while at the same time greedily amassing an ever larger share of the national economic pie. This Court heard — and rejected — such arguments in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). The medical profession tried the same tack in *American Medical Ass'n v. FTC*, 50 USLW 1107, in a debate the legal profession is now carrying to the Congress. The point was aptly summed up by *Time* magazine in a 1977 article dealing with the 100th anniversary of the American Bar Association:

> "Lawyers still hold themselves out as above the public fray and capable of self regulation. It is the same argument put out by meat manufacturers in 1906 and by auto manufacturers in 1965."

And what is the public interest being served by lobbying on the following issues, assuming *arguendo* application of an attenuated standard of governmental interest? These are

some of the positions taken by the State Bar of Michigan:

a. An effort to increase the permissible contingency fee rate set by MGCR 1963, 928;

b. Opposed 1978 HB 4263, which would have eliminated Michigan's application of the "American Rule" with respect to taxing attorney's fees as costs, see *State Farm Mutual Auto Ins. v. Allen*, 50 Mich. App. 71, 75, 212 NW2d 821 (1973), and allowed recovery of actual costs plus reasonable attorney fees for the defense of an action dismissed on summary judgment or on a finding of no cause for action after trial. To like effect was the State Bar's position on 1980 HB 4264. The Board of Commissioners has unswervingly opposed modification of the American Rule, despite the fact that several witnesses, including the chairman of the Real Property Committee (describing the Condemnation Act amendments fostered by the work of his committee), spoke against the American Rule as unjust;

c. "Strongly supported" 1978 HB 5173, mandating appointment of counsel for persons named in guardianship petitions;

d. Actively opposed 1978 SJR E which would have replaced the existing disciplinary structure with an "attorney tenure commission";

e. Strongly opposed various post-Watergate governmental reforms, including what became Michigan's Open Meetings Act, PA 1976, No 442, MCL 15.231 *et seq.* and the Lobbying Registration and Disclosure Act, 1978 PA 472, MCL 4.411 *et seq.* The State Bar also lent moral encouragement to judicial action to forestall implementation of the lobbying law, ultimately unsuccessful. *Pletz v. Secretary of State*, 125 Mich. App. 335, 336 NW2d 789 (1983), *lv den* 417 Mich. 1100.20 (1983);

f. Supported 1979 HB 5248, which would have increased

the maximum allowable group life insurance coverage to $75,000 (from $50,000) and allowed subsequent increases to keep pace with inflation.

A pattern is discernible. Legislation which would increase economic opportunities for lawyers is favored; that which would increase competition, or dissuade potential litigants from pursuing meritless lawsuits, is opposed. The public interest may be served, but only serendipitously or synergistically, never through advertence. Any nexus to the bar's regulatory functions has yet to be identified.

The Williams-Boyle "balancing test" carefully avoids any specifics, but deals exclusively in generalities, with one exception:

> "Clearly, the input of the Criminal Law Section is invaluable to the Legislature in its task of revising Michigan's Criminal Code."

418 Mich. at 298.

If the evidence makes anything clear, it is that the work of the Criminal Law Section has been inimical to the Legislative effort and to the public interest! The State Bar's draft of the revised criminal code contains a section on the use of deadly force that was roundly condemned by the Michigan Civil Rights Commission in its "Deadly Force Report", based on public hearings in which not a few law enforcement officers supported the Commission's position (exhibit 44).

For example, the bar version of the revised criminal code would allow a truant officer to use deadly force to stop a truant student from escaping from his custody — a result

Judge Lincoln commented on, based on his years of experience as a juvenile court judge. Judge Lincoln found this codification horrifying, noting that in all the years he was in charge of the Wayne County juvenile home deadly force was never justified in preventing an escape.

It should also be noted that this codification was prepared by a Special Committee, and NOT by the Criminal Law Section — sections are supported by voluntary additional dues, and their activities, so long as not suggesting the imprimatur of the State Bar itself, are not within the scope of this litigation.

Of course, acknowledging Appellant's First Amendment rights would not preclude the judiciary, the legislature, or the executive from enjoying the benefits of the collective or individual expertise of lawyers on topics of interest. Individual lawyers are obviously free to contribute their advice and experience, either on request or *sua sponte*, something the testimony established regularly occurs. Indeed, as to the collective wisdom of the bar, the Supreme Court of Michigan itself has regularly gone OUTSIDE the structure of the State Bar of Michigan to acquire it. Recent examples of this phenomenon are amendments to the class action suit rule, GCR 208, for which the court appointed its own committee, see 59 Michigan Bar Journal 476 (July, 1980) and 60 Michigan Bar Journal 687 (Sept. 1980), and changes to the Judicial Tenure Commission rules initiated by the Michigan Judges Association, see 413 Mich. 1102. Much of the work of which Mr. Dethmers (see Appendix, page 142) was so proud was done for committees appointed by the court in similar fashion.

To this must be added, again, the District of Columbia

experience — after the unified bar was forbidden to lobby with mandatory dues it collected sufficient voluntary contributions to continue its programs, in their entirety, unabated. Thus, the only evidence in the record establishes that when the uses to which mandatory dues can be put are circumscribed, the public interest, to the extent served by "political" activities of the bar, suffers absolutely no harm.

Therefore, any "balancing" of Appellant's First Amendment rights against the "public interest" is a weighing of something against nothing, because recognition of and respect for those rights entails no damage to the public weal.

4. State Bar expenditures for social activities open only to invited members of the bar violate Appellant's First Amendment rights.

The Boyle-Williams opinion addresses Appellant's challenge to State Bar social activity expenses and finds no implication of First Amendment interests, only of "economic" interests. 418 Mich. at 294. This Court, in *Ellis v. BRAC, supra*, 52 USLW at 4504, similarly found no infringement of First Amendment rights beyond that inherent in a union shop situation in passing on the constitutionality of union social hours.

The difference between State Bar social expenditures and those surveyed in *Ellis* is that those by the State Bar are for selected guests, rather than all bar members, while the expenditures of the Grand Lodge in *Ellis* were "formally open to nonmember employees". 52 USLW at 4503. As with expenditures for the lawyer placement service, lawyer referral service, and prepaid legal services, the State Bar is

forcing all lawyers to subsidize the economically aggrandizing political activities of a select few — principally expanding the economic horizons of lawyers in private practice at the expense of those in government service like Appellant.

It should not be doubted, either, that State Bar social activities are "political" — it was specifically established in the testimony of John Clark that a principal goal of such activity is to inculcate friendly attitudes by those who regulate the State Bar and those to whom the State Bar must go for desired legislative changes. Union social hours are for the enjoyment and fraternization of union members; State Bar social functions are one cog in its political activity machinery.

5. **The lawyer referral service, lawyer placement service, and prepaid legal service activity do not serve any cognizable governmental interest.**

The Michigan Supreme Court unanimously approved the expenditure of mandatory bar dues for the lawyer referral service. Yet this service is of no significant value to the public.

The service merely advises callers in need of legal assistance of the names of private practitioners who have described themselves as competent in the area of interest, and who are geographically near the inquirer. The Michigan Supreme Court, however, by contrast, rejected out of hand a proposal to certify lawyers as specialists based on self-designation (see the testimony of Sandor Gelman in the Appendix, pages 144-5).

Nor is any effort made to evaluate participants in the

service for competence; it is merely a convenient free service to private practitioners by which they can expand their client bases. Massachusetts' voluntary bar runs such a service and profits from it handsomely, since lawyers there recognize the economic value of the service to them and are willing to pay for it by sharing the resulting profits (see testimony of Thomas Wynn in the Appendix, p. 174). All other bar associations queried provide identical services at no cost to non-participants.

The lawyer placement service similarly benefits lawyers looking for work. No other job finding service in the nation is supported by compelled exactions from those who do not use the service (except, of course, government employment services, but the distinction between what government can do through legislative mandate and what quasi-governmental agencies can do at their discretion is well established). See *Ronwin v. Arizona Supreme Court*, ____ U.S. ____, 52 USLW ____ (May 14, 1984); *cf. Bates v. State Bar of Arizona*, 433 U.S. 350.

The purpose of State Bar support for prepaid legal services has been noted above (see testimony of Lawrence Nolan in the Appendix, p. 151) — profit for lawyers.

When a unified bar focuses its efforts on improving the economic lot of members, some or all, it becomes a guild or union. "Labor peace" however is not served by a lawyer's union in this context, so economic activities are not on the same plane as those by true unions, whose very *raison d'etre* is to improve wages, hours, and terms and conditions of employment of its members. A union that used compulsory fees to work for the benefit of only a few of its members,

outside of the scope of collective bargaining would not be deemed to have met the *Abood-Ellis* test of "germaneness". And, even in a union shop, there is always the opportunity for employees to vote to decertify the union, a saving grace not shared with a unified bar.

The distinction between a unified bar and a union thus calls for additional circumscription in the permissible uses of mandatory dues.

CONCLUSION

For the reasons stated herein, and those set forth in the two opinions authored by Justice Ryan in the Court below, probable jurisdiction should be noted and full briefs on the merits should be ordered.

Respectfully submitted,

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